Supreme Court, U. S.
FILED
1976

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON, Chief of Police, City of Huntsville, Alabama, Petitioner

VS.

GENERAL CORPORATION, a corporation, Respondent

On Petition for a Writ of Certiorari to The Supreme Court of Alabama

Brief for Respondent in Opposition

FERRISON M. GRAVES, JR.
Suite 2020
First National Bank Bldg.
Memphis, Tennessee 38103
Attorney for Respondent

INDEX

Page

Opinion Below 1

Jurisdiction 1

Questions Presented 1

Constitutional and Statutory Provisions involved .. 2

Statement of Case 2

Argument 5

1. The Federal Question is Not Substantial 5

Back Door Method 10

Conclusion 12

CITATIONS

Airways Theatre, Inc. v. Canale, 366 F. Supp. 343 ..7
(W. D. Tenn. 1973)

Art Theatre Guild, Inc. et at v. Clark L. Ewing,
U.S. ....., 44 L. Ed. 2d 82, 95 Ct. 1649 5

Commonwealth of Pennsylvania v. McDonald,
347 A. 2d 290 (Pa. 1975) 6

Erznozik v. City of Jacksonville,
U.S. ....., 95 S. Ct. 2268 8

Freedman v. Maryland, 380 U.S. 51 10

Gulf States Theatres of Louisiana, Inc. v.
Richardson, et al., 287 So. 2d 480
La. December 3, 1973) 6

Kingsley Books v. Brown,
354 U.S. 437, 77 S. Ct. 1325 8

Mini-Art Operating Company v. State,
486 S. W. 2d 8 (Ark. 1972) 6

M.T.M., Inc. v. Baxley, ... U.S. ....., 95 S. Ct.
1278 5

People v. Goldman, 298 N. E. 2d 177 (Ill. 1972) 6

Sanders v. State, 231 Ga. 608, 203 S. E. 2d 153 6

Southland Theatres, Inc. v. State of Arkansas
ex rel Tucker, 492 S. W. 2d 421 (Ark. 1973) ..6

Southland Theatres, Inc. v. State of Arkansas
ex rel Tucker, 495 S. W. 2d 148 (Ark. 1973) ..6

State of Indiana ex rel Blee v. Mohney
Enterprises, et al., 289 N.E. 2d 519
(Ind. 1973) 6

State of Iowa ex rel Facats v. N. D. D., Inc. d/b/a

Marion Adult Theatres and Richard Haes,
228 N. W. 2d 191 (Iowa, April 16, 1975) 6

State of Oklahoma ex rel Field v. Hess,
540 P. 2d 1165 (Okla. 1975) 6

Universal Amusement Company, Inc. v. Vance,
404 F. Supp. 33 (July, 1975) 7

CODE

Alabama Nuisance or Red Light Abatement Act,
Title VII, Section 1091, et seq. Code
of Alabama, 1940, Recompiled 1958 2

1961 Obscenity Act, Title 14, Sec. 374 (5)-(11) 7

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON, Chief of Police, City of Huntsville, Alabama — Petitioner

VS.

GENERAL CORPORATION, a corporation, — Respondent

Brief for Respondent in Opposition

OPINION BELOW

The opinion of the Alabama Supreme Court filed on September 18, 1975, is reported in **General Corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama**, 320 So. 2d 668.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The respondent would respectfully submit that a better statement of the questions presented is as follows:

1. Can the Alabama Nuisance or Red Light Abatement Act, Title VII, Section 1091 et seq. Code of Alabama, 1940, Recompiled 1958, be constitutionally applied to a motion picture theatre or is it an unconstitutional prior restraint?

2. Do the statutory provisions of the Alabama Red Light Abatement Act provide the minimum procedural safeguards required to be offered to motion pictures including notice, an adversary hearing, prompt judicial decision, burden of proof upon the State, proof of reputation admissible to establish prima facie case and lack of statutory provisions for a hearing focusing searchingly on the question of obscenity?

3. Is the Alabama Red Light Abstract Act in violation of due process and a prior restraint in that each motion picture must be judged upon its own merits; and the requirement of bond of the owners, the selling of personal properties, the closing of the theatres for one year and other matters permitted by the Nuisance Statute are in violation of the First and Fourteenth Amendment rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Alabama Red Light Statute and constitutional provisions are set forth in the Petition.

STATEMENT OF CASE

The Alabama Supreme Court in an opinion by four of the Justices found as unconstitutional and a prior restraint the prospective abatement of movie houses as public nuisances. This group of four judges found that the Red Light statute could adopt the Miller standards for defining lewdness as being obscenity. It stated in **dicta** that statute might pass muster for an injunction in the future against a particular film or if the films were shown in a drive-in theatre.

One judge concurred in the result with no opinion. Judge Maddox concurred that the injunction was improper as to a showing of **any** film but thought an injunction might be drafted so as to specifically define the type of films probibited in the future.

The Chief Justice and two others joined him in an opinion concurring in the results but disagreed with the language which attempts to cure the so-called definitional infirmities by judicial construction, that is the engrafting of Miller. Eight of the nine judges therefore concurred that the nuisance statute could not be applied to motion picture theatres to close them.

The case was brought by the Chief of Police **as a private citizen** and this private citizen aspect was emphasized by petitioner. One or two motion pictures were produced and shown. There were several time and motion studies introduced over

objections which do not show the entire film to be judged by the Court. Although other movies were alleged to be obscene, there was no proof as to what the contents or the names of any of these motion pictures were.

In supplement to the petitioner's statement of facts, there was entered a pretrial order on February 13, which set forth the issues of the hearing. Eugene Sweeton, the petitioner, claimed the issue of whether the showing of motion pictures constitutes lewdness as contemplated by the statute and the sole conduct of showing such motion pictures was sufficient to be abated as a nuisance. The theatre contended that the films were not lewd, that the nuisance statute was not the proper remedy and violated the First and Fourteenth Amendments. In the alternative, if the nuisance statute was a proper remedy, the statutory provisions were improper and in violation of the First and Fourteenth Amendments. Further, the Chief of Police had an adequate remedy of law under the obscenity statutes and the nuisance statute was not designed to prohibit the showing of motion pictures as alleged in the bill. A supplemental pretrial order was issued which reserved any issue except whether the showing of motion picture films in an enclosed theatre where admission is gained by adults is sufficient to constitute lewdness under the nuisance statute.

The Court did enter a final decree that the theatres were operating as a nuisance, that the

nuisance statute could be applied when the claim of nuisance was solely the showing of motion pictures and issued a permanent injunction closing the Fox Theatre for any purposes for a period of one (1) year and prohibiting the corporation from maintaining a nuisance at the Fox Theatre or elsewhere in the county.

General Corporation with others filed suit thereafter in the United States District Court for the Northern District of Alabama against Eugene Sweeton and others charging there had been an unconstitutional application of the nuisance statute against the theatre and that certain provisions of the statute were unconstitutional. A temporary restraining order issued on March 8, 1973, which resulted in the Amendment to the Decree filed on March 23, 1973 in the State Court. The three judge district court considered this cause in connection with **M.T.M., Inc. v. Baxley** and concluded that federal intervention as requested by the theatre would be improper. General Corporation did not choose to appeal from the three judge district court as did M.T.M., Inc. but pursued its remedy through its appeal to the Alabama Supreme Court resulting in this decision. This Court found that there was no jurisdiction to appeal and remanded the case of **M.T.M.** so that a timely appeal could be prosecuted to the Court of Appeals. **M.T.M., Inc. v. Baxley,** ..... U.S. ..... 95 S. Ct. 1278.

The Alabama Supreme Court found as stated

above and would remand the cause for further proceedings not inconsistent with its opinion.

ARGUMENT

1. THE FEDERAL QUESTION IS NOT SUBSTANTIAL.

The petitioner lists a number of cases before the Court in past terms which were decided or remanded for certain reasons. For example, in **Art Theatre Guild, Inc. et al. v. Clark L. Ewing,** this Court on April 21, 1975, dismissed the appeal for want of a substantial federal question. ..... U.S. ..... 44 Law Edition 2d 82, 95 S. Ct. 1649. That case arose from Ohio which appears to be the most prolific in producing nuisance cases. Some brought by Mr. Charles Keating and some by others and represented in the most part by counsel for petitioner herein on behalf of the Citizens for Decent Literature. The Ohio Supreme Court, however, limited the application of the nuisance statute to the showing of the particular film declared to be obscene. The owner of the property could have the theatre reopened on the basis that he would not play the particular film declared obscene. The Court stating:

> "The release provisions do not, as appellant contends, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint

on an activity generally protected by the First Amendment."

307 N. E. 2d at 918.

A number of states have found that their nuisance statutes by their very terms could not be applied to a motion pictures theatre, that the statutes were a prior restraint or that the provisions of the statutes did not have procedural safeguards necessary. Among these are **Sanders v. Sate,** 231 Ga. 608, 203 S. E. 2d 153; **State of Iowa ex rel Facats v. N.D.D., Inc.** d/b/a **Marion Adult Theatres and Richard Haes,** 228 N.W. 2d 191 (Iowa, April 16, 1975); **Gulf States Theatres of Louisiana, Inc. v. Richardson, et al.,** 287 So. 2d 480 (La. December 3, 1973; **State of Indiana ex rel Blee v. Mohney Enterprises, et al.** 289 N. E. 2d 519 (Ind. 1973); **Commonwealth of Pennsylvania v. McDonald,** 347 A. 2d 290 (Pa. 1975); **Mini-Art Operating Company v. State,** 486 S. W. 2d 8 (Ark. 1972); **Southland Theatres, Inc. v. State of Arkansas ex rel Tucker,** 492 S.W. 2d 421 (Ark. 1973); **Southland Theatres, Inc. v. State of Arkansas ex rel Tucker,** 495 S.W. 2d 148 (Ark. 1973); **People v. Goldman,** 287 N. E. 2d 177 (Ill. 1972); **State of Oklahoma ex rel Field v. Hess,** 540 P. 2d 1165 (Okla. 1975).

A more likely candidate for consideration by this Court dealing with the applicability of a nuisance statute made specifically applicable to motion picture theatres is a decision of a three judge court in Texas in **Universal Amusement Company, Inc. v**

Vance, 404 F. Supp. 33 (July, 1975). The nuisance portion of the case has been appealed by the State of Texas to the United States Court of Appeals for the Fifth Circuit where said appeal is now pending.

A decision on the Tennessee nuisance statute was not appealed by the State of Tennessee and such statute could not be applied to a motion picture theatre. See **Airways Theatre, Inc. v. Canale,** 366 F. Supp. 343 (W. D. Tenn, 1973).

The Alabama Red Light Abatement Statute raises a number of issues and would not allow the critical padlock issue **only** to be decided by this Court.

The Alabama statute construed the word "lewdness" to include the application of the statute to a motion picture theatre showing allegedly obscene motion pictures. The statute as drafted in 1919 does not appear to apply to motion pictures at all and was so contended by the respondent in the lower court. In addition, the concurring opinion by the Chief Justice of the Alabama Supreme Court concurred in by two other justices points out that the **1961 Obscenity Act,** Title 14, Secs. 374 (5)-(11) can be used to enjoin the showing of obscene motion picture films and there is no real reason to transform the Alabama Red Light Abatement Act into an injunctive procedure because such procedure has been available since 1961. Of course, this would limit the injunction to the showing of a particular motion picture film.

The provisions of the Alabama Red Light Abatement Statute are directed toward conduct, that is lewdness, assignation or prostitution by live individuals as opposed to that shown upon Celluloid film. The petitioner, however, seeks to state there is no First Amendment question in invoking the nuisance document.

The petitioner attempts to state that the State's power to protect morals allows the State to act. However, the arsenal of weapons put to use against obscenity is not unlimited. There is, of course, a criminal prosecution. Additionally, an injunctive type procedure aimed at one motion picture or one book based upon the models found in **Kingsley Books v. Brown,** 354 U. S. 437, 77 S. Ct. 1325 is available. A properly drawn statute might be available against outdoor motion pictures theatres and is certainly not foreclosed by the Court's decision in **Erznoznik v. City of Jacksonville,** ..... U.S. ..... 95 S. Ct. 2268.

Respondent contends that the consideration by the Court of the Alabama Red Light Abatement Statute would not be limited to one critical padlock issue. If the Court considered this statute, it should consider its various provisions as well as its applicability to motion pictures at all.

Among these issues would be the following:

1. The nuisance statute cannot be construed as applying to motion picture theatres.

2. A nuisance cannot be asserted against a motion picture theatre since each particular motion picture must be judged on its own. Use of the nuisance statute would be tantamount and would be a classic example of prior restraint or censorship.

3. Nuisance is too general and too vague and indefinite and so are the words "lewd" or "lewdness".

4. There are no procedural safeguards built into the nuisance statutes such as a prompt judicial hearing, a provision for a prompt judicial determination after hearing, and the burden of proof upon the censor.

5. The statute allows evidence of general reputation to establish a prima facie case which under First Amendment rights is impermissible.

6. A provision for the closing of the theatre for any purpose for a year, the sale of personal property and a requirement of a bond in the full amount by the owner in order to allow any use of the property by the owner on threatened punishment for contempt of court.

Traditionally, the nuisance has been applied to prostitution, gambling and liquor and it should not be applied to motion picture theatres under this general nuisance law adopted by the State of Alabama.

Respondent, therefore, contends there is no substantial federal question.

BACK DOOR METHOD

The use of a nuisance statute for the purpose of closing a theatre which may or may not have shown an obscene motion picture is using the back door as an attempted control for obscenity. It is a classic prior restraint and the decision of the Alabama Supreme Court is correct.

The arsenal by which the state may control obscenity has several weapons which have been listed above. However, these weapons should be exercised after giving due regard to the rights protected by the First and Fourteenth Amendments. The nuisance statute lacks both procedural safeguards. The statute provides that proof of prohibited acts such as proof of convictions can be introduced as well as evidence of **general reputation** in order to establish a nuisance. The statute provides for a temporary injunction with the operator of the property to show to the satisfaction of the Court that the nuisance complained of has been abated and if not, the Court **shall** issue an order closing the place until a final decision has been rendered. Although this was not done in this case, the statute clearly provides for such a method. There is no provision for a prompt decision as required in such cases as **Freedman v. Maryland,** 380 U. S. 51. The statute provides for the closing of the property for any purposes for a period of one (1) year. It does permit the release upon the placing of a bond in the full amount of the value of the property including the fact that contempt cita-

tions could be used if there were any alleged violations with the burden upon the motion picture operator to show that nothing was being violated.

Such a statute does not have the sensitive tools necessary in dealing with the area of obscenity and free speech. A state is not free to adopt whatever procedures it pleases for dealing with obscenity.

Respondent contends that the attempted use of the Red Light Abatement Statutes designed for prostitution, liquor and gambling is an attempt to use the back door against obscenity. The statute is not applicable and does not have the procedural safeguards. The attempt to use such a vague, sprawling nuisance doctrine should not be permitted.

The respondent respectively relies upon the state cases cited for the reasoning that the nuisance statute should not be applicable to the closing of a theatre for one (1) year. Certainly, an injunction against a particular film might be permissible under a properly drawn statute with procedure safeguards. The Alabama Public Nuisance Statute does not have either those safeguards or language to be applicable to the injunction of one particular film.

The attempt by the petitioner to use some type of mystical logical reasoning of major and minor premises leaves out various factors such as that each motion picture must be judged upon its own and that an attempted control of free speech and expression by motion pictures requires very sensitive tools.

CONCLUSION

Respondent submits that the decision of the Alabama Supreme Court as to prior restraint was proper. Although respondent did not agree that certain procedural provisions therein were proper, respondent respectfully submits that the decision below on prior restraint is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of March, 1976, two copies of the within Brief in Opposition for Petition for Writ of Certiorari were mailed, postage prepaid, to Charles H. Younger and James J. Clancy at their respective addresses. I further certify that all parties required to be served have been served.

Frierson M. Graves, Jr.,
Attorney for Respondent